Supreme Court, U. S.
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No. 79-1197

In the Supreme Court of the United States

OCTOBER TERM, 1979

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MERCY HOSPITAL ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Respondent contends (Br. in Opp. 4 n.2) that, since the court below remanded the case to the Board for consideration of the propriety of the bargaining unit " 'under a standard affording appropriate deference to the mandate of Congress' " and since the Board has not acted pursuant to the remand, "review of the instant case by this Court is premature." There is no merit to this contention. The basic question is whether Congress intended to permit the Board to apply traditional community of interest criteria in determining bargaining units in the health care industry provided that they did not result in an undue proliferation of units (as the Board concluded), or whether it intended the Board to apply more restrictive criteria (as the court below concluded). This difference over the appropriate standard to be applied in establishing bargaining units in the health care industry is ripe for resolution now, for resolution does not require

any additional factual findings but merely a determination as to Congress' intent in enacting the health care amendments to the National Labor Relations Act.[1] Acceptance of the remand could thus serve no useful purpose in this case. On the other hand, a prompt resolution of the question as to the appropriate standard for the establishment of bargaining units in the health care industry would not only be beneficial to the parties in this case, but would also aid in reducing the heavy volume of litigation on this issue which has been occurring (see Pet. 11 nn. 8 & 9).

2. Respondent does not deny that the question of the appropriate standard to be applied in determining bargaining units in the health care industry is an important one in the administration of the National Labor Relations Act. Respondent's principal ground for opposing the petition is that the three circuits[2] which have thus far had occasion to consider the question have disagreed with the Board. However, since, as we have shown in the petition (pages 12-20), there is at least a substantial doubt as to the correctness of the courts' reading of the legislative history of the health care amendments to the Act, the absence of

[1] *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967), is distinguishable. There, unlike here, the legal issue (*i.e.*, whether there was a contempt of a restraining order) turned upon the ascertainment of additional facts (*i.e.*, whether the arbitration award had lapsed when the strike commenced). But, where, as here, "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." R. Stern & E. Gressman, *Supreme Court Practice* 301 (5th ed. 1978).

[2] In addition to the decision herein, see *Allegheny General Hospital* v. *NLRB*, 608 F. 2d 965 (3d Cir. 1979); *NLRB* v. *West Suburban Hospital*, 570 F. 2d 213 (7th Cir. 1978); *Mary Thompson Hospital, Inc.* v. *NLRB*, No. 79-1374 (7th Cir. Mar. 5, 1980), 103 L.R.R.M. 2739.

a conflict of decisions should not militate against granting of the Board's petition in this case. As Chief Judge Fairchild stated, in dissenting, in *Mary Thompson Hospital*, *supra* (103 L.R.R.M. at 2743):

> The "admonition" [in the Committee Reports about avoiding an undue proliferation of units] is not part of the statute. Nor was there any change in the portion of the statute governing the Board's choice of an appropriate unit, so that the "admonition" would be helpful in interpreting the change.
>
> Under the circumstances, the "admonition" and the Board's response to it seem to be a matter between the Board and Congress. If the Board may be thought by members of Congress to pay insufficient heed to the "admonition," the Board may be courting a statutory change. But it seems to me that the "admonition" is not appropriate for application by the courts in deciding whether an order of the Board conforms to the statute or whether the Board has abused the discretion conferred on it by statute.

For these reasons as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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